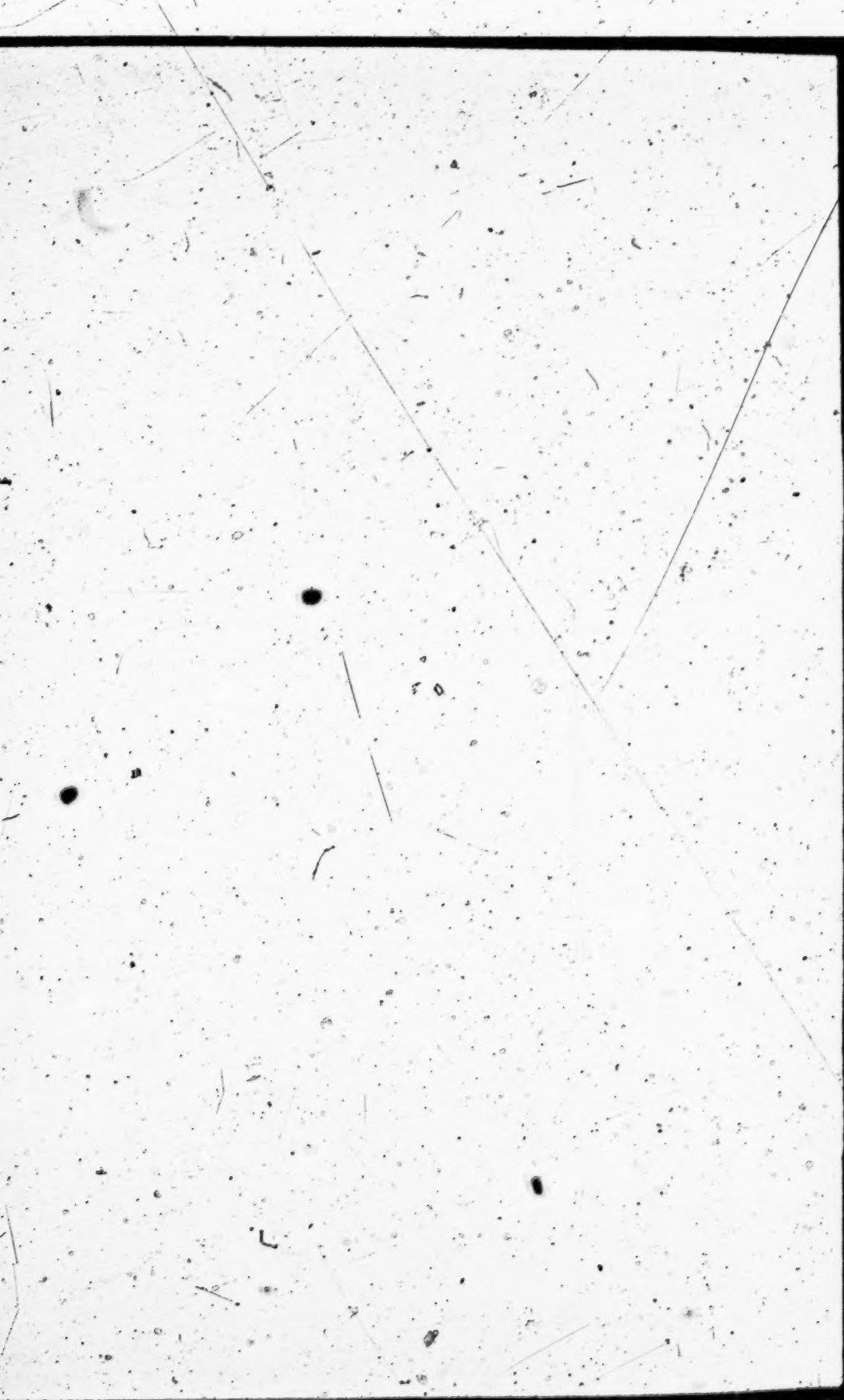

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1246 46

JAMES J. OESTEREICH,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COLONEL JACK P. BRUBAKER, Wyoming Selective Service Director,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on February 21, 1968.

Citations to Opinions Below

The *per curiam* opinion of the Court of Appeals for the Tenth Circuit is unreported. It is contained in the Court of Appeals record[1] at p. 4 and is printed in the Appendix,

[1] The original records of the District Court and the Court of Appeals, which have both been filed with the Clerk, are separately paginated. References to the District Court record are noted by the symbol "R"; references to the Court of Appeals record are noted by the symbol "RA".

infra, pp. 1a-2a. The order of the District Court for the District of Wyoming, dismissing the complaint, is unreported. It is set forth at pp. 28-33 of the District Court record and is printed in the Appendix, *infra*, pp. 3a-8a.

Jurisdiction

The judgment of the Court of Appeals was entered on February 21, 1968 (RA. 5). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

Petitioner, a student preparing for the ministry, was exempt from training and service in the Armed Forces under Section 6(g) of the Military Selective Service Act of 1967 [50 App. U. S. C. §456(g)]. Upon returning his Selective Service Registration Certificate to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under the Selective Service regulations, stripped of his exemption, reclassified I-A, and ordered to report for induction. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U. S. C. §460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate in his personal possession, violate the First Amendment, the due process clause of the Fifth Amendment, the Military Selective Service Act of 1967, and the Selective Service regulations?

3. Does Selective Service regulation 1617.1 [32 C. F. R. §1617.1], which requires each Selective Service registrant to "have in his personal possession at all times his Registration Certificate," as construed and applied in this case, violate the First Amendment?

Statutes and Regulations Involved

Section 10(b)(3), Military Selective Service Act of 1967; 50 App. U. S. C. §460(b)(3):

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has respondent either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Section 6(g), Military Selective Service Act of 1967; 50 App. U. S. C. §456(g):

> "Ministers of religion.—Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are

satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled shall be exempt from training and service (but not from registration) under this title."

Selective Service Regulation 1617.1; 32 C. F. R. §1617.1:

"Effect of failure to have unaltered registration certificate in personal possession.—Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register. When a registrant is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Registration Certificate (SSS Form 2) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, and such certificate shall be destroyed by the officer to whom it is surrendered."

Selective Service Regulation 1642.4(a); 32 C. F. R. §1642.4(a):

"Declaration of Delinquency Status and Removal Therefrom.—(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent."

Statement of the Case[2]

Petitioner is a duly enrolled student of Andover Newton Theological School, Newton Centre, Massachusetts, a "recognized theological or divinity school" [50 U. S. C. §456(g); 32 C. F. R. 1622.43(a)(4)]. As such he was classified IV-D by Local Board 11 on June 20, 1966 and thus exempt from military service.

On October 16, 1967, together with numerous other persons, petitioner returned his Registration Certificate (SSS Form 2) to the United States Government solely for the purpose of registering his dissent from participation by the United States in the war in Vietnam (R. 2). Petitioner, by affidavit, explained in detail his reasons for returning his Registration Certificate. He described it as "an act of collective conscience in support of our dying and suffering brothers who are presently fighting on our behalf in Vietnam" (R. 7). His act was based upon his "understanding of the claims which the Christian faith brings to bear on

[2] The Statement of the Case is based upon the allegations in the complaint, taken as admitted upon the government's motion to dismiss. *Clark* v. *Nebersee Finanz Korporation*, 322 U. S. 480 (1947).

the human situation" (R. 9) including the belief that "man responds to God's revelation by concrete participation in the structures and decisions of life, with a transcending loyalty to the will of God, the authority of the scriptures, and the community of interpretation which is the church" (*ibid.*), and in his belief in the doctrine of the "Just War". He stated his belief that "the Viet Nam situation reveals this war to be in violation of most of the criteria of the just war doctrine and is a major threat to the security and peace of the world" (R. 10).

Petitioner "became delinquent" on October 20, 1967, but a Delinquency Notice (SSS Form 304) was not mailed to him until November 7, 1967. On the same day, November 7th, a Notice of Classification (SSS Form 110) was mailed to petitioner notifying him that he was reclassified I-A (R. 3).[3]

The Delinquency Notice advised petitioner that he was delinquent because: (1) "Failure to have in his possession

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[3] Petitioner's declaration of delinquency and reclassification followed the issuance of a letter dated October 26, 1967 and a memorandum dated October 24, 1967 from General Lewis B. Hershey, Director of Selective Service, to all local Selective Service Boards. (The letter and memorandum are reproduced in the Appendix, *infra*, pp. 9a-12a.) The letter invited local boards to deny deferments to any registrant who takes part in "any action that violates the Military Selective Service Act or the Regulations, or the related processes." General Hershey's letter also said that "It is to be hoped that misguided registrants will recognize the long range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens."

The October 26, 1967 memorandum from General Hershey invited local boards to reclassify and induct registrants who abandon their Registration Certificates or current notices of classification.

a duly authorized Registration Certificate (SSS Form 2)" and (2) "Failure to provide the local board of his current status" (R. 3).

Petitioner duly appealed his I-A classification to the Selective Service Appeal Board for the State of Wyoming which affirmed the classification on December 27, 1967 (R. 3). On the same day, an order to report for induction was mailed to petitioner, directing him to report for induction in Cheyenne at 3:00 P.M. on January 24, 1968 (R. 3). (Petitioner's place of induction was subsequently transferred (pursuant to 32 C. F. R. §1632.9) to Dorchester, Massachusetts, and postponed to February 26, 1968.)

On January 19, 1968 suit was filed in the United States District Court for the District of Wyoming. (The complaint is set out at R. 1-6.) A hearing was held on January 22nd on plaintiff's application for a temporary restraining order (R. 14). After oral argument the District Court granted the defendants' Motion to Dismiss from the bench. An order dismissing the action was entered that day (R. 23-24), a subsequent *nunc pro tunc* order was entered on January 23, 1968 (R. 25), and an Order Setting Aside Prior Orders and Dismissing Plaintiff's Action was entered on February 6, 1968 (R. 28-33).[4] Notice of Appeal was filed on February 6, 1968 (R. 34).

Because there was an outstanding order requiring petitioner to report for induction on February 26, 1968, an expedited appeal was heard by the United States Court of Appeals for the Tenth Circuit on February 19, 1968. On

[4] The latter order, which superseded the two prior orders, is set out in the Appendix, *infra*, pp. 3a-8a.

February 21, 1968, the court affirmed the decision below in a *per curiam* decision which reads in its entirety as follows:

> "The judgment is affirmed for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U. S. C. §460(b)3. Orderly classification of a registrant for military service is not punitive in nature. Compare United States v. Capson, 10 Cir., 347 F. 2d 958. Appellant is not denied his right to ultimate judicial review of his claimed rights. Witmer v. United States, 348 U. S. 375, 377."

An application for a stay was denied by the Tenth Circuit on February 23, 1968. On the same day an application to stay petitioner's induction was presented to Mr. Justice White. On March 5, 1968, after the government had agreed to the postponement of petitioner's induction to allow time for consideration of the application, Mr. Justice White issued an order staying "the execution and enforcement of the judgment of the United States District Court for the District of Wyoming, as affirmed by the United States Court of Appeals for the Tenth Circuit . . ." on the condition that this petition for certiorari be filed on or before March 19, 1968.

Reasons for Granting the Writ

Certiorari should be granted in this case because it involves important issues of federal law, both constitutional and statutory, which have not been, but should be, settled by this Court, because it directly and immediately affects a large number of young men subject to Selective Service, because it involves the imposition of penalties and burdens upon petitioner and others solely for their public statement of opposition to government policies in Vietnam, and because it is only one illustration of an extensive government practice whose broad effect is to stifle the exercise of First Amendment rights.

1. Petitioner's registration certificate was one of 357 draft cards which were returned to the government at a demonstration at the Department of Justice on October 20, 1967 (Washington Post, January 25, 1968, p. ——), and an additional 297 draft cards returned the next day during a demonstration at the Pentagon (N. Y. Times, December 30, 1967, p. 2).

On October 24, 1968, the Director of Selective Service, General Lewis B. Hershey, issued a memorandum to all local draft boards recommending the reclassification and induction of registrants who abandon their Selective Service registration certificates or notices of classification. Appendix, *infra*, p. 11a. Two days later, General Hershey, in a letter addressed to all draft boards, invited the reclassification and induction of any registrant who "violates the military Selective Service Act or the Regulations, or ıe related processes . . . " App., *infra*, p. 9a.

The local boards responded promptly and affirmatively. Though counsel cannot say precisely how many registrants have been declared delinquent, stripped of their deferments or exemptions, reclassified I-A, and ordered for priority induction into the armed forces, we have personal knowledge of no less than forty-nine plaintiffs in ten lawsuits who, having either been declared delinquent, or declared delinquent and reclassified I-A, are subject to priority induction.[5] *Linzer, et al.* v. *Selective Service System Local Board No. 64, et al.*, No. 68 C 110 (E. D. N. Y.); *Kimball, et al.* v. *Selective Service Local Board No. 15*, No. 67/4733 (S. D. N. Y.); *Bucher, et al.* v. *Selective Service System, et al.*, No. 12, 26/67 (D. N. J.); *Collis* v. *Selective Service Local Board No. 28*, No. C-67-19-M (N. D. W. Va.); *Anderson, et al.* v. *Hershey, et al.*, No. 30729 (E. D. Mich.); *Steinert, et al.* v. *Clark, et al.*, No. 48654 (N. D. Cal.); *Kolden* v. *Selective Service Local Board No. 4*, No. 6-68-64 Civil (D. Minn.); *Breen* v. *Selective Service Local Board No. 16*, No. 12422 (D. Conn.); *Turley* v. *Selective Service System Local Board No. 134*, No. 68-290-F (C. D. Cal.); *Huey* v. *Selective Service Local Board No. 22, et al.*, No. —— (C. D. Utah);[6] *Connor*

[5] A "delinquent" *may* be classified I-A. Reg. 1642.12. If a delinquent is reclassified I-A, he *shall* be ordered to report for induction. Reg. 1642.13. I-A delinquents stand at the top of the order of call and are to be inducted before all other draftees. Reg. 1631.7.

[6] Huey was reclassified I-A delinquent not for turning in his draft card but for participating "in a peaceful public demonstration near the Armed Forces Entrance and Examination Station at 438 South Main Street, Salt Lake City, Utah, for the sole purpose of expressing publicly his dissent from American involvement in the Vietnam War." *Huey* Complaint, p. 2. *Huey* is an example of the punitive reclassification of a registrant pursuant to the Hershey letter of October 26, 1967. Appendix, *infra*, p. 9a. In *Peffer's and Hess* v. *Selective Service Appeal Board*, No. 7469 (W. D. Wash.), two men were reclassified I-A and ordered for priority

et al. v. *Selective Service Local Board, et al.*, No. Civ.—1968—33 (W. D. N. Y.).

Registrants who have been declared delinquent, declared delinquent and reclassified, or ordered to report for induction, include men in a variety of classifications. Some, like petitioner, had been exempt as ministers or students of the ministry (50 App. U. S. C. §456(g); Reg. 1622.43); others had been deferred as students (50 App. U. S. C. §456(h) and (i); Regs. 1622.25, 1622.26); a 37 year old registrant formerly classified V-A under Reg. 1622.50 because over-age, was reclassified I-A (N. Y. Times, December 20, 1967, p. 15); of the six plaintiffs in *Linzer* v *Selective Service System, supra,* all but one of whom have been reclassified I-A, two had II-S deferments as students, one had been classified I-Y because "under applicable physical, mental, and moral standards [he is] not currently qualified for service" (Reg. 1622.17), one had been deferred in class III-A as a parent (Reg. 1622.30), one had been classified IV-A having completed his military service (Reg. 1622.40),[7] and one had been classified V-A as over the age of liability (Reg. 1622.50).[7a]

Thus, petitioner is not a victim of an aberrant draft board. Though we cannot say with certainty how many men have been declared delinquent, reclassified, or ordered to report for induction, we know that the number is far greater than forty-nine.

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induction for distributing anti-war leaflets during their pre-induction physical examinations. The plaintiffs' deferments were restored by their boards only after suit was filed.

[7] The IV-A plaintiff was not reclassified I-A. Veterans may be reclassified I-A only with the authorization of the Director of Selective Service. Reg. 1642.12.

[7a] As of December 31, 1967, there were 15,593,748 registrants in V-A. Selective Service, February 1968, p. 4.

Whatever the number of registrants who have been directly affected by the policy at issue here, equally significant is the number of registrants who have been silenced out of fear that, should they publicly protest against the war in Vietnam, they too will lose their deferred or exempt status. It was precisely this enforced sacrifice of rights protected by the First Amendment that led to the decision in *Wolff* v. *Selective Service*, 372 F. 2d 817 (2nd Cir. 1967), a case almost identical to the case at bar.

In *Wolff*, two registrants classified II-S as full time university students participated in a demonstration to protest the Vietnam war. The protest took place at the offices of a Selective Service local board in Ann Arbor, Michigan. Both men were reclassified I-A by their local boards "at the request of the New York City Director of Selective Service." The request was based upon the assertion that by participating in the demonstration the students became delinquent by reason of their alleged violation of Section 12(a) of the Universal Military Training and Service Act.[8] 372 F. 2d at 820. Suit was brought by the plaintiffs to recover their II-S deferments. The case was dismissed in the District Court for lack of a "justiciable controversy." The Court of Appeals reversed. It found that "The threat to First Amendment rights is of such immediate and irreparable consequence not simply to these students but to others as to require prompt action by the

[8] The alleged Section 12(a) violation [50 App. U. S. C. §462(a)] was based upon its prohibition against knowingly hindering or interfering "by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto . . ." The equivalency in the case at bar is Section 12(b)(6) [50 App. U. S. C. §462(b)(6)] which makes it a crime to fail to possess one's registration certificate.

courts to avoid an erosion of these precious constitutional rights." 372 F. 2d at 820.

In reply to the government's claim that the policy of non-intervention in the affairs of Selective Service must be paramount, the Court said:

> "Only the most weighty consideration could induce us to depart from this long standing policy. But of all constitutional rights, the freedoms of speech and of assembly are the most perishable, yet the most vital to the preservation of American democracy. Historically, these preferred and paramount rights have continuously come under attack from the best intentioned sources. And once the erosion of these rights is permitted to begin, it is exceedingly difficult to halt and the intervening damage may be irreparable. Here it is the free expression of views on issues of critical current national importance that is jeopardized. On such topics perhaps more than any other, it is imperative that the public debate be full and that each segment of our society be permitted freely to express its views. Thus the allegations of the complaint in this case that the draft boards have unlawfully suppressed criticism must take precedence over the policy of non-intervention in the affairs of the Selective Service:" *Id.* at 822.

In rejecting the government's claim that the suit was not justiciable because the appellants had failed to exhaust their administrative remedies[9] and because they could not demonstrate irreparable injury, the Court said:

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[9] Unlike the petitioner in the case at bar (R. 3).

> "It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly. . . . Since it is the mere threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties." *Id.* at 824. (Citations omitted.)

We recite these excerpts from *Wolff* to emphasize that this case involves more than just petitioner's rights. Respondents' acts generally imperil the exercise of First Amendment rights.

Whatever the purpose of the Selective Service policy may be,[10] its inevitable effect is to stifle or at least to deter the exercise of free speech. It would be unrealistic to imagine that there are not those who would rather remain silent

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[10] General Hershey, interpreting his October 26, 1967 letter to draft boards, said, "I actually have a lot of confidence in the kids of this country. All I hope to do is to discourage some of the excesses we have had in the past." N. Y. Times, November 8, 1967, pp. 1, 10.

It was reported that Department of Justice officials believed that were the Selective Service Regulations amended to incorporate General Hershey's policy, "it would be unconstitutional on the ground that it would violate an individual's right to free speech under the First Amendment." N. Y. Times, November 10, 1967, p. 12. Nonetheless, General Hershey responded that "he did not intend to rescind his recommendation, even if the Justice Department did not support him. . . ." N. Y. Times, November 11, 1967, p. 5. Though there subsequently was an apparent rapprochement between General Hershey and the Attorney General, see N. Y. Times, December 10, 1967, p. 1, the agreement seems to have been short-lived. See N. Y. Times, December 11, 1967, p. 13; December 12, 1967, p. 16.

and civilian, than speak out and risk the loss of their deferred or exempt status. It will presumably be said that registrants who express their views without violating the Selective Service Act need not fear any sanctions. But given the broad language of General Hershey's letter and memorandum[11] and the equally broad language of the delinquency regulation (Reg. 1642.4(a)) through which the policy is implemented,[12] it must be acknowledged that "When the statutes also have an overbroad sweep . . . the hazard of loss or substantial impairment of those precious [First Amendment] rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).

2. This case presents six questions of federal law which should be settled by this Court. Each of the questions is independently substantial; but given the First Amendment setting out of which they arise, the need for their resolution is compelling.

a. The government has argued, and the courts below have held, that Section 10(b)(3) of the Military Selective Service Act of 1967, *supra*, p. 3, prohibits judicial review of petitioner's reclassification and induction order except in a criminal prosecution should petitioner refuse to submit to induction [see *Estep* v. *United States*, 327 U. S. 114 (1946)], or by habeas corpus should petitioner choose to submit to induction [see *Eagle* v. *United States ex rel. Samuels*, 329 U. S. 304 (1946)].

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[11] His letter, for example, invites local boards to reclassify those who violate not only the "Military Selective Service Act or its regulations" but also "the related processes." App., *infra*, p. 9a.

[12] See pp. 24-26, *infra*.

Petitioner does not generally challenge the proposition that judicial review of Selective Service classification in the ordinary case can properly be confined to criminal prosecution or habeas corpus, for the power of Congress to establish modes of review is broad. U. S. Constitution, Art. III; *Lockerty* v. *Phillips*, 319 U. S. 182 (1943); *Yakus* v. *United States*, 321 U. S. 414 (1944). But see *Townsend* v. *Zimmerman*, 237 F. 2d 376 (6th Cir. 1956).

On the other hand, this Court has recognized that the right to effective judicial review cannot be impaired by placing extreme burdens and penalties on the exercise of that right. *Ex Parte Young*, 209 U. S. 123 (1908); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920).

Young held that the guarantee of due process of law required judicial review where an administrative order could be reviewed only as a defense to contempt proceedings for failure to follow prescribed rates, with penalties up to five years in jail and a $5,000 fine. The Court recoiled at this deterrent to judicial review:

> "A law which indirectly accomplishes a like result [making administrative orders conclusive] by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U. S. at 147.

The concern for insuring judicial review has nowhere been more meticulous than when the rights for which the judicial power is invoked are those protected by the First Amendment. Decisions of this Court over the last several years leave little doubt of the primacy of First Amendment rights. The Court has expressed concern not only with direct governmental attempts to infringe those rights, but also with statutes and rules that have an indirect but deadly effect on the exercise of those rights. One of the most effective ways to destroy rights is to inhibit and frustrate the remedies available for their implementation. And it follows that the best way to cripple the remedy is to place burdensome limitations upon those who seek to exercise it. To interpret the statute in question as requiring the registrant who is the victim of punitive classification and induction order to subject himself to indictment and prosecution or induction merely to assert his claim that the board action violates his First Amendment rights, effectively nullifies those rights.

This Court has held that statutory schemes which impose an intolerable restraint and have a "chilling effect" on the exercise of First Amendment rights cannot constitutionally be allowed. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). *Ex Parte Young, supra,* and *Oklahoma Operating Co.* v. *Love, supra,* demonstrate that in the protection of rights of property judicial review cannot be forestalled until the point where its utilization becomes fraught with peril and hazard. *Dombrowski,* and the long line of cases it synthesized, show that rights of liberty are surely entitled to at least the same protection. Petitioner cannot be forced to choose between the Scylla of adhering to an order which may ultimately be held void or the Charybdis of disobey-

ing an order which may ultimately be held valid. See, *Yakus* v. *United States, supra* (dissenting opinion).

Dombrowski v. *Pfister, supra,* is central to this case. There various officials of a civil rights organization were being threatened with prosecution under state statutes which appeared to be drawn in violation of the First and Fourteenth Amendments. They brought suit in the federal court seeking declarative and injunctive relief against prosecution or the threat of prosecution. The suit was dismissed by a statutory three-judge court and this Court reversed.

After expressing its concern for considerations of federalism and noting that only "special circumstances" justify "cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution," 380 U. S. at 485, the Court pointed out that the complaint depicted a situation in which "a substantial loss or impairment of freedom of expression will occur if appellants must await the state court's disposition and ultimate review in this Court . . . " 380 U. S. at 486. Because of the "sensitive nature of constitutionally protected expression" and in light of the fact that free expression is "of transcendent value to all society" the normal rules as to standing have been relaxed in this area.

The Court concluded that the need for "prompt judicial resolution of First Amendment claims" outweighted considerations of federalism and justified the exercise of federal jurisdiction.

The parallels to the instant case are obvious. Here petitioner asserts that the punitive reclassification violates his protected constitutional rights to freedom of expression. As the courts below interpreted Sec. 10(b)(3), in order to

secure judicial review of the invalid induction order, petitioner must violate the law, suffer the ignominy of indictment, and endure the burdens of a criminal trial. The very fact of prosecution, and even its threat, as the Court noted in *Dombrowski,* will have the prohibited "chilling effect" on petitioner's rights and on the rights of others who protest the Vietnam war.

The effect of such towering obstacles to judicial review on other Selective Service registrants is crucial. Few will be willing to pay such a high price for the right to dissent. The result is clear: thousands of registrants will be denied First Amendment rights. They will have to exercise their right to lawful dissent with one eye cast on their local draft board, fearful that their activities will meet with disapproval and result in reclassification. Those with valid deferments will "steer far wider of the unlawful zone," *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). Draft boards can reclassify them I-A with impunity and dare registrants to run the hazards of criminal prosecution to prove the board wrong. In such an environment, "sensitive" constitutionally protected expression can hardly flourish as our free society demands it must.

In order to avoid constitutional infirmities, we urge that where "special circumstances" exist, that is, where government action has a "chilling effect" on registrants' First Amendment rights, the federal courts have jurisdiction to review. Cf. *Dombrowski* v. *Pfister, supra* at 485: Note, 81 Harv. L. Rev. 685, 690 (1967). Such an approach avoids any implication that the ruling which petitioner urges could be taken advantage of by any registrant aggrieved by an order of his local board. We do not contend that every board order should give rise to pre-induction review.

For the purposes of this case it is only necessary to decide whether in the exceptional case which stems from the violation of protected rights of free expression, the policy of orderly conscription must give way to the compulsion of the Constitution.[13]

b. Certiorari should be granted to decide whether the punitive use of delinquency and reclassification procedures, as in this case, is authorized by statute or regulation.

The Military Selective Service Act of 1967 declares that service in the armed forces is an obligation and privilege. Section 1(c), 50 App. U. S. C. Sec. 451(c). This view of service is also reflected in Section 6(m) of the Act which allows, if it does not encourage, exclusion from service of those convicted of offenses punishable by imprisonment for a term exceeding one year.

Nonetheless, respondents here have presumed to invoke the delinquency and reclassification procedures against petitioner because he violated Reg. 1617.1 which requires regis-

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[13] A similar approach has been taken in the area of labor relations. In *Leedom* v. *Kyne*, 358 U. S. 184 (1958), this Court sustained direct judicial review of an NLRB certification order made in excess of the Board's powers, rejecting the argument that the Act precluded such review:

> "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190.

This "exception" for orders in excess of the Board's jurisdiction was extended to include the case of an order which caused international repercussions. *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963). By 1964 this "extraordinary circumstances" rule, which allowed direct challenge of Board orders in certain instances, was clearly established. See, *Boire* v. *Greyhound Corporation*, 376 U. S. 473, 479 (1964).

trants to have their registration certificates in their personal possession, a requirement enforceable under the Act's penal provision. Section 12(b)(6), 50 App. U. S. C. Sec. 462(b)(6). Thus, the circumstances here are the same as in *Wolff* v. *Selective Service, supra,* where the Second Circuit held that the draft boards "exceeded their jurisdiction" when they undertook to declare registrants delinquent on the ground that they violated the Act's penal provisions. 372 F. 2d at 820. ". . . [N]o regulation authorizes a draft board to declare a registrant a delinquent or to reclassify him for such action." *Id.* at 821.

As *Wolff* points out, however, jurisdiction of some offenses under Section 12 is shared by the District Courts and the local boards. The decision refers explicitly to that portion of Section 12(a) which makes it a crime for any person knowingly to "fail or neglect or refuse to perform any duty required of him under or in execution of this title."[14] Thus, as the Second Circuit said, "a parallel clause of the regulations provides that if a registrant fails to produce certain requested information or to appear for questioning, he may under 32 C. F. R. §1642.4(a) be declared a delinquent and classified or reclassified I-A." 372 F. 2d at 821.

The question here, therefore, is whether the possession requirement of Reg. 1617.1 is the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification. We believe it is not.

The principal responsibility of local boards is to select young men for induction into the armed forces. "Classifica-

[14] We pass the question whether this language meets the test of specificity required for criminal statutes.

tion is the key to selection . . . ", Reg. 1622.1(b), and the key to classification is "pertinent" information. Reg. 1622.1 (b).

The regulations empower the boards to secure this information in a variety of ways. Reg. 1641.7(b) requires every registrant "to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his home address, of his receipt of any professional degree in a medical, dental or allied specialist category." Changes in any of these conditions must be reported within ten days of their occurence. Reg. 1647(b) requires every registrant to "submit to his local board in writing all information which the local board may at any time request from him concerning his occupational, marital, family, dependency, or military status or his physical condition or his receipt of a professional degree."

Reg. 1622.1(b) provides that "the mailing by the local board of a Classification Questionnaire (SSS Form 100) . . . shall be notice to the registrant that unless information is presented to the local board . . . which will justify his deferment or exemption from military service the registrant will be classified in Class I-A." Furthermore, "the local board shall proceed with the registrant's classification and classify him whenever (1) he fails to return his Classification Questionnaire . . . , or (2) he fails to provide the local board with any other information concerning his status which he is requested or required to furnish." Reg. 1623.1 (b). In addition, "The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or

other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants." Reg. 1625.1(c). Finally, local boards are authorized to receive information from state and local welfare and governmental agencies. Reg. 1621.14.

Information being the key to classification, the local board must have some device by which to secure that information from uninformative registrants. That device is the delinquency procedure. Regs. Part 1642.

Delinquency, properly viewed, is analogous to civil contempt. It is designed not to punish for past acts, but to coerce compliance with the procedures of the system leading up to classification. Delinquency status says to the registrant: until you bring yourself into compliance with the rules designed to enable your local board to ensure that you are properly classified, you will be treated as having waived all the benefits of the System's procedures, and therefore as available for immediate induction.

The delinquency regulations explicitly provide for the expunging of delinquency—indeed, they relax the ordinary rule that a reopening of classification cannot be had after an order to report for induction, thereby allowing the registrant to conform to the requirements of Selective Service procedure right up to the last moment. Reg. 1642.14(b). The registrant is not bound by his waiver of the System's procedural rights until he is actually in the armed forces. Up until the very last moment he can, by cooperating with the procedures which enable his local board to make appropriate classification decisions, receive consideration of his claim that he should not be considered available for imme-

diate induction. *Ibid.* The "Delinquency Notice" itself requests the registrant to contact his local board at once—obviously with an eye to clearing up the alleged default.

Possession by a registrant of his registration certificate plainly has nothing to do with the ability of a local board to perform its classification function. In no way is the board's consideration of the propriety of a registrant's current classification (or a classification he claims), or its ability to maintain official contact with him, impeded or affected by whether or not he happens to possess the required document.

It follows from the fact that the possession requirement is not an integral part of the relationship between a local board and its registrants, that to use reclassification as a sanction to enforce the requirement is to use it as punishment—not as mere "civil" enforcement of the rules of the classification procedure.

Acts unrelated to the classification process itself may be crimes under the Act. As such, they may well be punishable—after a fair trial, before an impartial judicial tribunal, with all of the required procedural safeguards and rights. They may not, under the Regulations, the Act, or the Constitution, be punished in summary proceedings appropriate only for "civil" enforcement of the rules of the classification process.[15]

c. Certiorari should be granted to decide whether the delinquency regulations are impermissibly vague and overbroad.

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[15] Should certiorari be granted, petitioner would also explore the power of a local board to strip petitioner of the mandatory exemption contained in Sec. 6(g) of the Act.

Reg. 1642.4(a), *supra*, p. 5, authorizes declarations of delinquency (and consequent I-A classification and priority induction, Regs. 1642.12, 1642.13) of a registrant who "has failed to perform any duty or duties required of him under the Selective Service law. . . ." As construed by respondents in this case, the regulation can be applied to punish a registrant for exercising First Amendment rights.

An examination of the regulations demonstrates that the delinquency provisions are designed to serve a discrete purpose. In addition to serving as a device for securing information needed for intelligent classification (see Sec. 2(c), *supra*, p. 20), the "duties required" under Reg. 1642.4 (a) would seem to be limited to such things, for example, as the duty to return the Classification Questionnaire within 10 days (Reg. 1621.10), the duty to correct an inadequate Questionnaire (Reg. 1621.13), and the duty to report for physical examination (Reg. 1628.16). But as we have seen, the regulation is in fact capable of being construed to include not only the alleged "duty" to possess his registration certificate owed by petitioner, but also the kind of "duty" said to have been owed by the appellants in *Wolff* v. *Selective Service, supra*. According to General Hershey, it could, and should, be construed also to include the "duty" not to violate the Act in its entirety, as well as its "related processes", or to perform acts "under unfortunate influences of misdirected emotions . . . or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation. . . ." App., *infra*, p. 10a.

A statute or regulation which lends itself to such broad interpretation runs afoul not only of the general rule against vague statutes, see, e.g., *Cramp* v. *Board of Education*, 368

U. S. 278 (1961), but also the rule in *Dombrowski* v. *Pfister, supra,* which condemns statutes with an "overbroad sweep . . . which lend themselves too readily to denial of [First Amendment] rights." 380 U. S. at 486.

d. Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment.

Kennedy v. *Mendoza-Martinez,* 372 U. S. 144 (1963), spells out the criteria to be used to measure whether administrative sanctions are to be denominated penal or regulatory.[16] Though not all the *Mendoza-Martinez* criteria apply to the facts of this case, enough of them do to warrant this Court's plenary examination of the question, for if petitioner's induction is to be denominated punishment, the absence of due process in the Selective Service System would infect petitioner's induction in the same way as the absence of due process fatally infected the expatriation in *Mendoza-Martinez.*

Of the *Mendoza-Martinez* criteria, at least four clearly apply here.

(1) Induction "involves an affirmative disability or restraint." This could hardly be gainsaid, in light of the well-

[16] "The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ." 372 U. S. at 168-169.

recognized facts of military life; indeed, the availability of *habeas corpus* to secure release from the armed forces, *Eagle* v. *United States ex rel. Samuels*, 329 U. S. 304 (1946), necessarily rests upon such an hypothesis.

(2) Induction premised upon delinquency "comes into play only on a finding of *scienter*." The Act makes it an offense to "knowingly" fail or neglect to perform a required duty. Sec. 12(a)(b). This Court has imposed the same criminal *mens rea* requirement upon liability for delinquency status, reclassification, and induction consequent thereon. *Bartchy* v. *United States*, 319 U. S. 484 (1943).

(3) Punitive reclassification followed by induction is designed to "promote the traditional aims of punishment—retribution and deterrence." The delinquency notice (SSS Form 304) resolves any doubt on this score, for it informs the delinquent registrant that unless he brings himself into conformity with his duties under the Act and Regulations, he will be liable to reclassification to Class I-A or to prosecution. One is at a loss to imagine any functions other than deterrence and retribution which might be served by taking a registrant out of a classification in which he otherwise belongs—like IV-D (ministerial), IV-F (unfit for service), II-S (student), or III-A (dependency)—and reclassifying him for immediate induction into the armed forces.

(4) "[T]he behavior to which [punitive reclassification and induction] applies is already a crime," under Section 12(b) of the Act.

If the Court should hold that petitioner's induction is punishment, it would then be obliged to decide whether the punishment was imposed with due process of law. We believe the Court could not but conclude that due process

is entirely absent from the procedures leading to petitioner's induction.

(1) *Counsel.* In Selective Service proceedings, including punitive reclassifications by which it is sought to impose induction as a punishment, there is no right to the assistance of any counsel, let alone to appointed counsel. Cf. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Reg. 1642.1(b) states: "No registrant may be represented before the local board by anyone acting as attorney or legal counsel." Compare *United States* v. *Capson*, 347 F. 2d 959 (CA 10), cert. denied, 382 U. S. 911 (1965).

(2) *Confrontation and Cross-Examination.* No such rights are provided for in the Regulations, and Reg. Part 1624 ("Appearance before Local Board") plainly does not contemplate a hearing in which a registrant accused of a violation can confront and cross-examine his accusers. See *Harris* v. *Ross*, 146 F. 2d 355 (5th Cir. 1944).

(3) *Compulsory Process.* Not only is this right not affirmatively enforced in Selective Service proceedings, but the Regulations explicitly provide that it is wholly within the discretion of a Local Board to decide whether to "*permit* any person to appear before it with or on behalf of a registrant. . . ." Reg. 1642.1(b). It has been held that a registrant has no constitutional or statutory right to have witnesses before his local board. See, e.g., *Uffleman* v. *United States*, 230 F. 2d 297 (9th Cir. 1965), *Harris* v. *Ross*, 146 F. 2d 355 (5th Cir. 1944).

(4) *Self-Incrimination.* In the classification process the burden is on the registrant to establish his eligibility for a deferment or exemption. Regs. 1622.1(c), 1622.10, 1623.2. A registrant is bound to provide all required information,

to notify his board of any change in his circumstances, and to answer such further questions as his board may ask. Reg. 1625.1; Act Sec. 15(b). After a registrant receives SSS Form 304, the "Notice of Delinquency," it is entirely up to him to exonerate himself if he can. Unless he persuades the local board that he was not "guilty," he will quickly be inducted.

(5) *Burden of Proof.* Since Selective Service procedure in effect puts the burden of proving his innocence upon the accused registrant, this requirement is not met in delinquency proceedings. See Regs. 1622.1(e), 1622.10.

(6) *An Impartial Tribunal.* With one minor exception (Reg. 1604.55), no "change of venue" or "disqualification for bias" is available under Selective Service procedure.

(7) *Public Trial.* Selective Service procedures do not contemplate anything but secret proceedings. Reg. Part 1624.

(8) *Jury Trial.* No such right is afforded in the Selective Service System.

As the Court observed in *Mendoza-Martinez,* "If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." 372 U. S. at 167.

e. Certiorari should be granted to decide whether Reg. 1617.1 (*supra,* p. 4), which requires "personal possession" of one's Registration Certificate, as construed and applied in this case, violates the First Amendment.

In *O'Brien* v. *United States,* No. 232, this Court now has before it the constitutionality of that portion of Section 12(b) of the Miltary Selective Service Act of 1967 which

forbids the knowing destruction of registration certificates. Though there is some relationship between destruction and non-possession, counsel in *O'Brien* pointed out that the distinctions were not "systematically presented and argued below by either side" (Brief for David Paul O'Brien, p. 68), and asked that the question be remanded should the Court be disposed to rule upon it at all.

The *O'Brien* brief points out a few of the different arguments available on behalf of the unconstitutionality of Reg. 1617.1, *viz.*, whether there was proper delegation of the power to enact such a regulation; whether the Selective Service System has the power to require virtually all adult male citizens to carry the equivalent of an internal passport; and whether there is a constitutionally significant difference between the validity of such a requirement as applied to a peaceful protest context as opposed to a scheme to defraud.

In addition to those questions, there is, of course, the question whether violation of the possession requirement, in the context of this case, can validly be made the basis for reclassification and induction, regardless of whether it can be the basis for prosecution.[17]

f. Certiorari should be granted to decide whether the Selective Service Regulations were violated in this case.

An administrative agency is bound to follow its own regulations. *Service* v. *Dulles*, 354 U. S. 363 (1967); *Estep* v. *United States*, *supra* at 121. Respondent Local Board No. 11 violated the regulations in this case by mailing petitioner his delinquency notice and notice of I-A classification on the same day, November 7, 1967 (R. 3).

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[17] See *United States* v. *Wills*, No. 765, petition for cert. filed October 25, 1967.

The orderly procedure contemplated by the delinquency regulations is clear: (1) information comes to the attention of the local board indicating that a registrant is delinquent; (2) the local board declares that that is the effect of the information, and notifies the registrant; (3) the registrant is afforded a reasonable time to clear up the matter [see Reg. 1642.4(c)]; (4) only if, after a reasonable time, the board "has not removed him from such delinquency status" may it proceed to reclassify him based upon his delinquency status. Reg. 1642.12. This is a clear and simple procedure, and in it SSS Form 304 performs the indispensable function of notice. SSS Form 304 is itself perfectly explicit as to its purpose. It tells the registrant why he has been placed in delinquency status, it directs him to communicate at once with his local board or to seek advice from the local board nearest him, and it notifies him that his alleged breach, if not cleared up, may result in a I-A classification or in prosecution.

On no view can the actions of respondent Local Board No. 11, be held to have complied with the simple, straightforward notice requirement of the Regulations. Petitioner received his delinquency notice and notice of reclassification on the same day. Both notices were mailed the same day (November 7, 1967). The notice of delinquency required by the Regulations was deprived of any function whatsoever. How could petitioner clear up the matter with his local board, as SSS Form 304 required him to do to avoid being reclassified I-A? A delinquency notice is exactly what the Regulations call it—a "Notice"—and to function as such it must precede by a reasonable time the action of the local board which has immediate consequences, namely, reclassification.

This Court said of a similar procedural error, "This is not an incidental infringement of technical rights. Petitioner has been deprived of . . . a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." *Simmons* v. *United States*, 348 U. S. 397, 406 (1955).

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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March 19, 1968.

APPENDIX

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 9902—JANUARY TERM, 1968

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

JAMES J. OESTEREICH,

Appellant,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COL. JACK P. BRUBAKER, Wyoming Selective Service Director,

Appellee.

MELVIN L. WULF (JOHN GRIFFITHS, LAWRENCE R. VELVEL, JOHN A. KING, and WILLIAM REYNARD were with him on the brief), *for Appellant.*

ROBERT V. ZENER, Attorney, Department of Justice (Edwin L. Weisl, Jr., Assistant Attorney General, Robert N. Chaffin, United States Attorney, and Morton Hollander, Attorney, Department of Justice, were with him on the brief), *for Appellee.*

Before:

LEWIS, BREITENSTEIN and HICKEY,
Circuit Judges.

PER CURIAM:

The judgment is affirmed for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U. S. C. §460(b)3. Orderly classification of a registrant for military service is not punitive in nature. Compare United States v. Capson, 10 Cir., 347 F. 2d 958. Appellant is not denied his right to ultimate judicial review of his claimed rights. Witmer v. United States, 348 U. S. 375 377.

Order Setting Aside Prior Orders and Dismissing Plaintiff's Action

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

No. 5194 Civil.

JAMES J. OESTEREICH,

Plaintiff,

—VS.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COL. JACK P. BRUBAKER, Wyoming Selective Service Director,

Defendants.

The above-entitled matter having come on regularly for hearing before the Court on January 22, 1968, plaintiff appearing by and through his counsel, John A. King and Melvin L. Wulf, and defendants appearing by and through Robert N. Chaffin, United States Attorney for the District of Wyoming, and LeRoy Amen, Assistant United States Attorney for the District of Wyoming, and the Court having heard the oral arguments of counsel for plaintiff and of counsel for defendants, and having carefully examined the record on file herein, including the pleadings and the affidavits of plaintiff and his counsel, and having examined the brief submitted by plaintiff's counsel and having studied

the authorities relied upon by plaintiff's counsel and by counsel for defendants, and being fully advised in the premises, FINDS:

1. The prior Orders made and entered herein on January 22 and 23, 1968, are inconclusive and non-determinative of the issues raised by the pleadings and fail properly to adjudicate the rights of the parties herein, and should be set aside.

2. Plaintiff's pleading filed herein on January 19, 1968, contains no caption to identify his action. For the purposes of the hearing thereon and of this Order, said pleading is treated as a complaint and a motion for a temporary restraining order.

3. Plaintiff's jurisdictional allegations are mere conclusions unsupported by factual allegations in the complaint and his assertions of federal jurisdiction are unsubstantial, frivolous and without merit. His complaint fails to satisfy the jurisdictional requirements of 28 U. S. C. 1331, 1343, and 2201 in the following particulars:

a. Plaintiff's action does not arise under the Constitution, laws or treaties of the United States. His complaint contains no allegations of facts that defendants subjected him to unreasonable, arbitrary or invidious discrimination, or that he was deprived of his constitutional rights under the First, Fifth, and Sixth Amendments of the Constitution of the United States. Federal jurisdiction is not conferred by the mere assertion of constitutional rights unsupported by factual allegations.

b. Plaintiff's allegation that the matter in controversy exceeds the value of $10,000.00 exclusive of in-

terest and costs is made only for the purpose of invoking the jurisdiction of this court. Plaintiff seeks no monetary damages and does not allege facts which are determinative of the value of the rights sought to be gained by his action. His complaint and argument are concerned with intellectual freedom rather than with economic loss. The failure of jurisdiction of this court under 28 U. S. C. 1331 appears on the face of the complaint for its failure to allege facts showing that the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, or to show facts from which such jurisdictional requirement may be inferred.

c. Sub-sections (1) and (2) of 28 U. S. C. 1343 are inapplicable to confer jurisdiction on this court for the reason that plaintiff does not seek to recover damages. Sub-section (3) of 28 U. S. C. 1343 is likewise inapplicable as no state statute, law, ordinance, regulation, custom or usage is involved in this action. Subsection (4) of 28 U. S. C. 1343 confers jurisdiction only where an Act of Congress providing for the protection of civil rights is involved and no such Act of Congress is relied upon by plaintiff. Hence 28 U. S. C. 1343 does not support the jurisdiction of this court over plaintiff's action.

d. 28 U. S. C. 2201 does not establish a new basis for jurisdiction of federal courts, but provides a new remedy merely. It requires diversity of citizenship and the statutory jurisdictional amount in controversy to confer jurisdiction on this court. Plaintiff and defendant Col. Jack P. Brubaker are citizens of the State of Wyoming. Plaintiff alleges no monetary damages and

asserts no value on the rights he seeks to protect by this action. This Court, therefore, lacks jurisdiction under 28 U, S. C. 2201 for plaintiff's failure to satisfy the requirements of diversity of citizenship and jurisdictional sum or value in controversy.

4. This Court has no jurisdiction to grant judicial review of the classification or processing of the plaintiff by the local board, the appeal board, or the President. Plaintiff does not challenge his classification as a defense to a criminal prosecution, and he has not responded either affirmatively or negatively to the order of December 27, 1967, to report for induction. The statutory conditions of Public Law 90-40 approved June 30, 1967, 81 Stat. 100, Section 8 (c), 50 App. U. S. C. Section 460 as amended, are not satisfied. Congress may grant or withhold judicial review of administrative action except when required by the Constitution. Estep v. United States, 327 U. S. 114 (1946).

5. Plaintiff fails to allege that there is no basis in fact for the 1-A classification assigned to him. Neither does he allege that defendants acted in an arbitrary or capricious manner in re-classifying him, nor that defendants discriminated against him by such re-classification.

6. Defendants are arms of the Executive branch of the United States Government, and their performance of their duties imposed upon them by the Universal Military Training and Selective Service Act is not subject to the supervision of or direction by the Judicial Department. This Court has no jurisdiction to encroach upon the discretion vested in defendants in the performance of their responsibilities under the Act. To assume jurisdiction over plain-

tiff's action would violate the fundamental constitutional precept of separation of powers of the Executive and Judicial Departments of the United States.

7. Plaintiff knowingly violated the law and the regulation requiring him to have his registration certificate in his possession at all times.

8. The exempt status claimed by plaintiff and the classification assigned to him are matters of legislative and executive grace. Exemptions and classifications are a privilege, not an inalienable right conferred by the constitution or statute. Absent positive allegations of arbitrary or capricious acts, defendants have the right and duty to exercise their informed discretion and classify plaintiff without interference by the judiciary.

9. Plaintiff's allegations that the declaration of delinquency, the re-classification, and the order of induction are punitive in nature, imposed as a penalty, are unsubstantiated conclusions of fact; they are merely illusory conclusions and opinions based on conjecture. The administrative action taken by defendants does not constitute penal action as it does not subject plaintiff to criminal punishment.

10. Section 2282 of 28 U. S. C. providing for a court of three judges is not applicable unless questions are raised in the complaint as to the constitutional validity of an Act of Congress. It does not apply to administrative orders or action. It confines its requirement for a court of three judges to cases where an Act of Congress is attacked upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States. Plaintiff's action

does not attack any act of Congress on constitutional grounds and raises no substantial question of constitutional validity of the Universal Military Training and Selective Service Act. Plaintiff's action challenges the validity of the administrative action with regard to his individual induction status; his prayer only, challenges the validity of the regulations under the Universal Military Training and Selective Service Act. Plaintiff's action raises no substantial question of constitutional validity as to the Act itself. Plaintiff's complaint, therefore, is not within 28 U. S. C. 2282 providing for the convocation of a three-judge District Court. William Jameson & Co. v. Morgenthau, 307 U. S. 171 (1939); Sardino v. Federal Reserve Bank of New York, et al., 2 Cir., 361 F. 2d 106 (1966).

Now, THEREFORE, IT IS ORDERED that the Order of this Court made and entered herein on January 22, 1968, denying temporary restraining order and dismissing complaint, and the Order Nunc Pro Tunc made and entered herein on January 23, 1968, dismissing the complaint of the plaintiff, be, and the same are hereby, set aside.

IT IS FURTHER ORDERED that plaintiff's motion for temporary restraining order and plaintiff's complaint, together with the cause, be, and the same are hereby, dismissed for the reasons stated herein, the parties to pay their own costs.

Dated this 6th day of February, 1968.

EWING T. KERR
Judge.

New York Times, Thursday, November 9, 1967

Texts of Letter and Memo on the Draft

Special to The New York Times

WASHINGTON, Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum, dated Oct. 24, from General Hershey on draft cards:

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military of naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces,

rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with sound procedure.

MEMORANDUM

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appro-

priate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(d) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.